ARIZONA COURT OF APPEALS
DIVISION ONE

CINDY VONG and LA VIE LLC, Plaintiffs/Appellants, v. DONNA AUNE, in her official capacity as Executive Director of the ARIZONA STATE BOARD OF COSMETOLOGY, Defendant/Appellee.	Court of Appeals, Division One Case No. 1 CA-CV 10-0587 Maricopa County Superior Court Case No. CV2009-037208

APPELLANTS' REPLY BRIEF

Clint Bolick (021684)
Carrie Ann Sitren (025760)
(602) 462-5000
(602) 256-7045 (Fax)
Attorneys for Appellants

Scharf-Norton Center for Constitutional Litigation
at the GOLDWATER INSTITUTE
500 E. Coronado Rd., Phoenix AZ 85004
litigation@goldwaterinstitute.org

ARIZONA COURT OF APPEALS
DIVISION ONE

CINDY VONG and LA VIE LLC, Plaintiffs/Appellants, v. DONNA AUNE, in her official capacity as Executive Director of the ARIZONA STATE BOARD OF COSMETOLOGY, Defendant/Appellee.	Court of Appeals, Division One Case No. 1 CA-CV 10-0587 Maricopa County Superior Court Case No. CV2009-037208

APPELLANTS' REPLY BRIEF

Clint Bolick (021684)
Carrie Ann Sitren (025760)
(602) 462-5000
(602) 256-7045 (Fax)
Attorneys for Appellants

Scharf-Norton Center for Constitutional Litigation
at the GOLDWATER INSTITUTE
500 E. Coronado Rd., Phoenix AZ 85004
litigation@goldwaterinstitute.org

Table of Contents

Table of Authorities

Cases

Statutes

Constitutional Provisions

Other Authority

Argument

Appellee's Answering Brief enlarges the issues before the Court. Her arguments essentially distill to three: that the action is not properly a collateral attack, that appellee is not a proper defendant, and that the constitutional claims do not state a cause of action.

The three arguments do not apply with equal weight to the three causes of action set forth in the Complaint. Count I alleges that appellant Cindy Vong's spa fish therapy business does not fall within the Board of Cosmetology's limited statutory jurisdiction under A.R.S. § 32-501(2), (6), or (10). Count II alleges that if the cosmetology statute does encompass and prohibit spa fish therapy, such application violates the equal privileges or immunities and due process guarantees of the Arizona Constitution. Count III alleges that the application of the statute to prohibit spa fish therapy violates the protections of the 14th Amendment and 42 U.S.C. § 1983.

The trial court agreed with appellee's first argument, holding that Cindy Vong was obliged to exhaust administrative remedies.[1] The court, however, did not address Counts II and III, nor explain why those counts should be dismissed as a matter of law.

---

[1] As appellee notes (Br. at 4), the trial court expressly disagreed with appellee's second argument, ruling that appellee is a proper defendant.

Appellee here attempts to plug that gap, but fails. As a consistent line of Arizona cases holds, a direct action is a permissible collateral attack where the agency's jurisdiction is questioned, which clearly it is here. The agency has no jurisdiction to decide the constitutionality of statutes. Failure to exhaust administrative remedies does not bar a § 1983 action under the federal constitution, a proposition so well-established that appellee does not attempt to refute it. The appellee is a proper defendant. And as numerous state and federal decisions demonstrate, Vong is entitled to prove her constitutional claims.

All of appellee's arguments are further encumbered by the rule that an appellate court will sustain a dismissal "only if it is certain that plaintiff 'can prove no set of facts which will entitle him to relief upon his stated claims'." *Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors*, 184 Ariz. 419, 424, 909 P.2d 486, 491 (App. 1995) (citation omitted).[2] For all of those reasons, the

---

[2] A case cited by appellee illustrates how appropriately reluctant this Court has been to dismiss cases out of hand. In *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 391, 121 P.3d 1256, 1261 (App. 2005), the Court affirmed dismissal only as to one claim, because it raised the "unsettled" question of "when life begins," which is "best left to the Legislature." At the same time, it reversed dismissal of three other claims. *Id.*, 211 Ariz. at 403, 121 P.3d at 1273. Here there are no such lofty "unsettled" questions that the Legislature needs to decide. Rather, this case presents questions of statutory interpretation and constitutional application, which should not be dismissed prior to the development of an evidentiary record. *Jeter* also stands for the proposition that the Court should separately examine each claim to determine whether the trial court acted properly in dismissing it.

decision of the trial court should be reversed and the Complaint should be reinstated so that Cindy Vong may defend her right to pursue her livelihood.

1. Collateral Attack. This action is completely consistent with the declaratory judgment statute, which calls for exhaustion of administrative remedies "except for the purpose of questioning the jurisdiction of the administrative agency over the person or subject matter." The statutory rule is corroborated by voluminous Arizona case law, which appellant presented in her Opening Brief (Op. Br. at 12-16), and will not repeat here. The rule was especially well-summarized in a Texas case, *P.U.C. of Tex. v. Allcomm Long Distance, Inc.*, 902 S.W.2d 662, 666 (Tex. App. 1995) (citations omitted):

> Generally, an agency's final order, like the final judgment of a court of law, is immune from collateral attack. . . . However, since administrative bodies are entitled to exercise, without interference from courts, only those functions conferred by statute, a trial court's intervention in an administrative proceeding may be permissible when an agency's actions exceed its statutory authority. Therefore, a well-recognized exception to the rule that agency actions are normally immune from collateral attack occurs when an agency acts beyond the scope of its statutorily conferred powers; a suit for declaratory or injunctive relief will lie in such a situation. Furthermore, the doctrine of administrative remedies is not applicable when an agency acts outside its statutory authority.

See also *City of Celina v. Dynavest Jt. Venture*, 253 S.W.3d 399, 404 (Tex. App. 2008) (collateral attack proper to consider whether agency acted within statutory or constitutional authority).

Application of the collateral attack rule thus is simple and straightforward, and derived from the language of the statute: does the Complaint "question[] the jurisdiction of the administrative agency over the . . . subject matter?"

Unquestionably it does. Count I questions the agency's jurisdiction over spa fish therapy. Counts II and III question the constitutionality of the statute, if it does confer such jurisdiction, as applied by the defendant to extinguish Cindy Vong's business. Hence the lawsuit in its entirety is a proper collateral attack.

A. Count I. Appellee contends (Br. at 24) that "by signing the Consent Agreement, Ms. Vong agreed that the fish pedicures that she was providing to her customers violated thirteen subsections" of the Board's rules. Cindy Vong would not be here if that was true. To the contrary, the Consent Agreement recites that "[t]his Agreement is evidence of a prior violation of the Boards' (sic) *interpretation* of Arizona statutes and rules governing the practice of cosmetology" (I.R. 10, Exh. A at 2) (emphasis added). The conclusions of law were unilateral, prefaced with the following language: "The Board issues the following Findings of Fact, Conclusions of Law and Order" (*id.*, Exh. A at 3). Appellant did not sign on to the Board's interpretation. Instead, she signed the

Agreement and accepted the penalty to "preserve [her] legal and constitutional claims for direct challenge in this Court" (I.R. 1, ¶ 25).[3]

As the briefs so far make clear, it is a matter of great dispute whether as to Count I, the statutes confer authority upon the Board to regulate spa fish therapy. Under Arizona law, agencies possess only such powers as are expressly conferred by statute. See, e.g., *Ariz. St. Bd. of Regents v. Ariz. St. Personnel Bd.*, 195 Ariz. 173, 175, 985 P.2d 1032, 1034 (1999).[4] As we discussed in our Opening Brief (Op. Br. at 18-21), the Board's statutory authority to regulate spa fish therapy is dubious at best. But that is not the question before this Court. Rather, the only question as to Count I is simply whether appellant *questioned* the agency's subject-matter jurisdiction, which plainly she did in the Complaint and continues to do. That is the sole prerequisite for a direct collateral attack.

---

[3] The Agreement speaks plainly for itself. But as appellee concedes (Br. at 9), "consent agreements are considered under contract principles." One of those principles is estoppel. Appellant would show that the quid pro quo for her signing a Consent Agreement that shut down her business at considerable cost was the opportunity to conclude the proceedings before the Board and to proceed by direct action to a tribunal where her claims would be heard rather than summarily and cavalierly rejected. The law gives her that right and appellee should not now be heard to object.

[4] Appellee provides a useful discourse on the limits of agency authority (Br. at 15).

The trial court's analysis proceeded in odd fashion: it ruled that the action was a collateral attack, then ruled that the Board does have subject-matter jurisdiction, then concluded on that basis that the action was not a proper collateral attack. (I.R. 23.) In the process, it improperly conflated the procedural question (whether the action challenges the agency's subject-matter jurisdiction) with the merits (whether the agency possesses such jurisdiction). As in *Dioguardi v. Superior Court*, 184 Ariz. 414, 417, 909 P.2d 481, 484 (App. 1995), "to reach its jurisdictional conclusion, the trial court erroneously assumed the answer to the very question before it"—whether the agency possessed subject-matter jurisdiction. Thus, as in *Dioguardi*, it was premature for the trial court to dispose of the issue in a motion to dismiss. Rather, the question of whether an agency has subject-matter jurisdiction combines legal and factual issues that are not properly resolved in a motion to dismiss. See, e.g., *Bonner v. Minico, Inc.*, 159 Ariz. 246, 253-54, 766 P.2d 598, 605-06 (1989); *Resolution Trust Corp. v. Foust*, 177 Ariz. 507, 509, 869 P.2d 183, 185 (App. 1993). This action is a proper collateral attack and should be allowed to proceed.

B. Count II. Appellee's argument regarding collateral attack grows even more feeble as she attempts to apply it to the constitutional claims.[5] Appellee

[5] Appellee's entire argument on whether Counts II and III present a proper collateral attack consists of a single page (Br. at 18), in which appellee asserts that the trial court "properly did not address those issues," but offers no independent

does not dispute that the agency cannot declare a statute unconstitutional. But that is precisely the gravamen of Count II: that the cosmetology statute, as wielded by the agency to prohibit Cindy Vong's spa fish business, is unconstitutional as applied. Though an agency can "apply constitutional doctrines when resolving claims," it has no authority "to declare statutes unconstitutional." *Moulton v. Napolitano*, 205 Ariz. 506, 513, 73 P.3d 637, 644 (App. 2003); accord, *Estate of Bohn v. Waddell*, 174 Ariz. 239, 249, 848 P.2d 324, 334 (App. 1992). Count II challenges the agency's subject-matter jurisdiction and thus comprises a proper collateral attack.

C. Count III. Appellee makes no argument as to why Count III is not the proper basis for a collateral attack. The gravamen of Count III is the same as Count II, except that it invokes federal constitutional claims and 42 U.S.C. § 1983. "There is no requirement that a plaintiff exhaust state remedies prior to filing a § 1983 lawsuit." Lee, *2008 Handbook of Section 1983 Litigation*, § 1.01(D). Where substantive constitutional claims are presented, as here, the categorical rule is that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy v. Bd. of Regents*, 457

---

substantive analysis of those counts or response to appellant's arguments on those counts.

U.S. 496, 516 (1982); accord, *Zinermon v. Burch*, 494 U.S. 113, 124-25 (1990); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1160 (9th Cir. 2000).

For all of the foregoing reasons and others set forth in the Opening Brief, this action is a proper collateral attack and Cindy Vong should be permitted to prove her case.

2. Proper Defendant. As to all counts, appellee contends that she is not subject to suit as a proper defendant. Despite a title that ordinarily would suggest something a bit more substantial, appellee insists throughout her brief that as Executive Director she is a mere functionary who is powerless to deliver the relief appellant seeks (see, e.g., Br. at 16 ("[T]he Board's Executive Director has no independent authority to enforce the Cosmetology Act [and] no power to give Ms. Vong any requested relief"); accord, Br. at 27-29).

This revelation was a bit of a surprise, so we hastened to check the identity of the official who signed the Consent Agreement that terminated Cindy Vong's business and sanctioned her for her actions. It turns out to be none other than the appellee, Donna Aune, in her capacity as Executive Director (I.R. 10, Exh. A at 4). Not only that, but all of the enforcement steps along the way were taken by Sue Sansom, appellee's predecessor as Executive Director. As the public record attached as an appendix to this brief demonstrates, Executive Director Sansom sent an undated letter to Cindy Vong advising her that "Fish Pedicures constitute a

violation of the Board's statutes and rules and you should therefore refrain from conducting these pedicures immediately." The letter went on to advise Vong that her conduct could constitute a class 1 misdemeanor. Indicating that the letter preceded any formal action by the Board itself, the Executive Director stated that "[t]his matter will be placed on the next available Board agenda for further action. In the meantime you should immediately refrain from offering or performing fish pedicures in your salon."

Not knowing that the Board subsequently would take the position that the Executive Director has no enforcement authority, Cindy Vong understandably took this letter and its very explicit threats very seriously. In fact, the letter is at complete variance with appellee's subsequent convenient assertion that she lacks enforcement authority and therefore cannot be sued to halt her own unlawful actions and the agency's unlawful actions. If appellee has the authority to enforce the statute, rules, and the Board's interpretation of them, plainly she has the authority to enforce the statute and rules in a different manner if ordered to do so by a court.

Appellee asserts that "[i]n enacting the Cosmetology Act, the Legislature did not give the Board the authority to delegate any of its discretionary or enforcement authority to its Executive Director or grant any authority directly to the Executive Director" (Br. at 15). Actually, it did. A.R.S. § 32-503(c) provides that the Board

"may employ" an executive director "as it deems necessary to carry out the purposes of this chapter," and the Board may "designate" the executive director's duties. Appellee asks the Court (Br. at 16 n.3) to compare A.R.S. § 32-1405, which provides for an Executive Director for the Medical Board. The only difference is that the position is mandatory for the Medical Board and discretionary for the Board of Cosmetology. Obviously, as appellee's title indicates, and as her actions demonstrate, the Board of Cosmetology exercised its discretion to appoint an Executive Director as it "deem[ed] necessary to carry out the purposes" of the statute. There is simply no question that the appellee is a proper defendant.

The cases cited by appellee on this point further underscore that conclusion. This Court's decision in *Yes on Prop. 200 v. Napolitano*, 215 Ariz. 458, 160 P.3d 1216 (App. 2007) affirms that it is not necessary to sue the official or entity with ultimate decisionmaking authority. The court dismissed the complaint against the Secretary of State because it did not allege that she "administers" any state benefit programs or deprived the plaintiffs of any rights, *id.*, 215 Ariz. at 468, 160 P.3d at 1226, while holding that the Governor was a proper defendant because of her "implementation" of Prop. 200. *Id.*, 215 Ariz. at 470, 160 P.3d at 1228.

The Complaint here easily satisfies the pleading and substantive requirements of the *Prop. 200* decision. It alleges that both of the original defendants (the Board and the Executive Director) construed and applied the

cosmetology statute to effectively prohibit spa fish therapy and to terminate Cindy Vong's business (I.R. 1, ¶ 37), improperly asserted jurisdiction over spa fish therapy (¶ 33), subjected spa fish therapy to irrational regulation (¶ 36), exceeded legitimate authority to regulate for health and safety with respect to spa fish therapy (¶ 38), and violated appellant's constitutional rights (¶¶ 39-44). The statutory authorization of the appointment of an Executive Director to "carry out the purposes" of the cosmetology statute corroborates the pleadings as to appellant's capacity to administer and/or implement the statute and rules. The signing of the enforcement letter and the Consent Agreement further confirm appellee's authority to administer and/or implement the law as required by *Prop. 200*. The requisites are plainly met.

In *Riley v. County of Cochise*, 10 Ariz. App. 55, 60, 455 P.2d 1005, 1010 (App. 1969) (emphasis deleted), another case cited by appellee, the court found no justiciable controversy based on the conclusion that neither the plaintiffs nor defendants were proper parties, because the case represented "a mere difference of opinion between public officers," and the County Attorney "has no real interest in opposing the declaration sought." This lawsuit, by contrast, presents much more than a mere difference between public officers—it deals with appellant's livelihood. Obviously, appellee has an interest in opposing the relief sought, given

that she and her predecessor inflicted the harm in the first place and are vigorously defending against this action.

Two other cases cited by appellee make it completely clear that appellee is a proper defendant. In both *Crawford v. City of Houston*, 386 F. Supp. 187 (S.D. Tex. 1974) and *Hogge v. Hedrick*, 391 F. Supp. 91 (E.D. Va. 1974), the courts dismissed claims against public officials in their *individual* capacities because "[a]cting in such a capacity, these defendants are powerless to reinstate plaintiff. *There is a different result with respect to injunctive relief sought against these defendants in their official capacities*." *Crawford*, 386 F. Supp. at 192 (emphasis added); accord, *Hogge*, 391 F. Supp. at 96. Here, appellee is not sued in her individual capacity, but only in her official capacity, in which she has the legal capacity to enforce the law.

In *Cornwell v. Calif. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1266 (S.D. Cal. 1997), involving a similar challenge to barriers to entry imposed by the cosmetology board, the court held that the "state officials with the statutory duty to enforce and administer the allegedly unconstitutional statute are the proper defendants" for purposes of § 1983. Here as in *Cornwell*, the Executive Director is the front-line official who is enforcing and administering the law. For all of those reasons, she is a proper defendant.

3. Dismissal for Failure to State a Cause of Action. In Counts II and III, Cindy Vong argues that the prohibition against spa fish therapy violates her due process rights under the state and federal constitutions because it is an irrational, arbitrary, and excessive barrier to a legitimate business; and that the prohibition violates her equal protection rights because it singles out a particular business for disadvantageous treatment.

In urging that Counts II and III should be dismissed for failure to state a cause of action, appellee asserts that Cindy Vong "has not shown" an equal protection violation and "must prove" a lack of rational basis to demonstrate that the cosmetology statutes, as applied by appellee to shut down the spa fish business, violate due process. With those assertions, appellant agrees. She has not yet proved a constitutional violation because the cause of action prematurely was dismissed.

The case law is abundant that she is entitled to prove her case. We learned in law school that most cases capsize on the shoals of the rational basis test. But although the test presents a stiff challenge, both state and federal courts have been diligent both in allowing plaintiffs to make their case and in striking down arbitrary and excessive restrictions on the right to earn a living, of which appellee's actions represent a paradigm example. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356

(1886), cited with approval in *Jones v. Sterling*, 210 Ariz. 308, 312, 110 P.3d 1271, 1275 (2005).

The rational basis test in Arizona is particularly robust. See, e.g., *Big D Constr. Co. v. Ct. of App.*, 163 Ariz. 560, 789 P.2d 1061 (1990) (striking down bid preference law under rational basis standard). In *Buehman v. Bechtel*, 57 Ariz. 363, 376-77, 114 P.2d 227, 233 (1941), the Arizona Supreme Court struck down a law requiring licensing of photographers as a violation of the 14th Amendment and Ariz. Const. Art. II, § 4. As the Court held, "The police power, broad and comprehensive as it is, may not be used to prevent a person from following a business or occupation so innocuous, and the effort to do so is so unreasonable and arbitrary as to amount to a deprivation of a property right—the right to earn a living—without due process." *Id.*, 57 Ariz. at 372, 114 P.2d at 231.

Here, appellant alleges that spa fish therapy poses no health and safety risk to the public (I.R. 1, ¶¶ 12-17), and therefore is innocuous. If appellant proves those allegations at trial, it will bring appellee's closure of her business within the sweep of the due process protections of the 14th Amendment and Arizona Constitution under *Buehman*. Indeed, this case would be even clearer than in *Buehman*, which imposed a licensing requirement as opposed to the outright ban of spa fish therapy here.

The closest case on point is *Cornwell*, *supra*, which challenged on federal and state constitutional grounds the California Board of Cosmetology's interpretation of cosmetology statutes to prevent the practice of African hairstyling by unlicensed practitioners. The court denied the motion to dismiss both the federal and state due process and state equal protection claims because "plaintiff has adequately alleged that there is no rational relationship" between the required curriculum and the practice of African hairstyling. *Id.*, 962 F. Supp. at 1278. Subsequently, based on extensive evidence, the court struck down the licensing requirement, holding that "it is irrational to require Cornwell to comply with the regulatory framework. Even given due deference, the Act and regulations as applied to Cornwell fail to pass constitutional muster as they 'rest[] on grounds wholly irrelevant to the achievement of the State's objectives'." *Cornwell v. Hamilton*, 80 F. Supp.2d 1101, 1118 (S.D. Cal. 1999) (citing *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)). Likewise here, Cindy Vong has alleged facts that if proven would demonstrate that it is irrational to apply the cosmetology licensing regime to a type of activity never contemplated by it—spa fish therapy.

Similarly, in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), plaintiffs challenged the state's prohibition against the sale of caskets to the public except by licensed funeral directors. The Sixth Circuit, "[f]inding no rational relationship to any of the articulated purposes of the state," *id.* at 228, struck down the law. See

also *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) (applying rational basis test to strike down test pest-control licensing requirement selectively imposed on certain non-pesticide using businesses); *Santos v. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994) (striking down anti-jitney law under rational basis standard); *Brown v. Barry*, 710 F. Supp. 352 (D.D.C. 1989) (striking down ban on street-corner shoe-shine stands under rational basis scrutiny).

All of these state and federal decisions, spanning 122 years from *Yick Wo* to *Merrifield*, share common characteristics: they involve plaintiffs challenging regulatory barriers to their chosen businesses or professions as a violation of due process and/or equal protection; the courts all applied the deferential rational basis standard (with the exception of *Yick Wo*, which was decided before the U.S. Supreme Court created three levels of constitutional scrutiny); the plaintiffs in each instance were permitted to prove their case; and in each case the courts struck down the regulatory barriers.

Cindy Vong shares in common the plight of the plaintiffs in all of these cases, but so far not their fortunate fate. The trial court here dismissed the action without even considering the constitutional claims. In so doing, it engaged not in judicial deference but abdication. As the court declared in *Brown*, 710 F. Supp. at 355 (emphasis deleted), "although it is still a sound constitutional principle that legislatures, reflecting the wills of those who elected them, should enjoy a

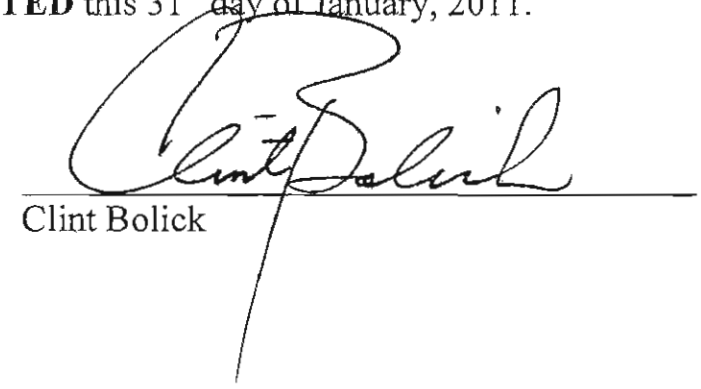
substantial degree of immunity from judicial interference, it is clear that a court would be shrinking from its most basic duty if it abstained from both an analysis of the legislation's articulated objective and the method that the legislature employed to achieve that objective."

The court below applied no such scrutiny to Cindy Vong's important constitutional claims, nor did it allow her to demonstrate that the statute does not contemplate or govern spa fish therapy in the first place. As a matter of well-established law, appellant is entitled to prove her case at trial.

Conclusion

For all the foregoing reasons, the judgment of the trial court should be reversed and the case remanded for further proceedings.

RESPECTFULLY SUBMITTED this 31st day of January, 2011.



Clint Bolick

Certificate of Compliance

Pursuant to ARCAP 14, I certify that the attached brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 3,692 words, exclusive of the items listed in ARCAP 14(b).

RESPECTFULLY SUBMITTED this 31st day of January, 2011.

Carrie Ann Sitren

Certificate of Service

ORIGINAL and SIX COPIES of the foregoing FILED this 31st day of January, 2011 with:

Clerk of the Court
Arizona Court of Appeals – Division One
1501 West Washington Street
Phoenix, AZ 85007

TWO COPIES of the foregoing MAILED by prepaid U.S. Postal Service First Class Mail prepaid this 31st day of January, 2011 to:

Bridget Fitzgibbons Harrington
Office of the Attorney General
1275 W. Washington Street
Phoenix, AZ 85007

Elizabeth James

Appendix

Arizona State
Board of Cosmetology

1721 East Broadway • Tempe AZ 85282
Phone 480.784.4539 • Fax 480.784.4962
www.azboc.gov

Cindy Vong, Owner
LaVie, L.L.C.
1534 E. Ray Road #117
Gilbert, AZ 85296

RE: Spa Fish Pedicures

Dear Ms. Vong:

The Arizona State Board of Cosmetology (Board) received a complaint regarding your salon which alleged that you were performing fish pedicures. As you are aware, the Board's Investigators have been to your salon on October 29, 2008 and again on November 10, 2008. We have also received legal advice on this issue from the Arizona Attorney General's Office.

Fish Pedicures constitute a violation of the Board's statutes and rules and you should therefore refrain from conducting these pedicures immediately. Fish Pedicures are not within the scope of practice of cosmetology nor of nail technology found in A.R.S. §32-501(6) and (9).

In addition, this type of pedicure is a clear violation of the Board's Rule A.A.C. R 4-10-112 on Infection Control and Safety Standards. Any tool or piece of equipment used in a pedicure must be stored in a dry storage and disinfected in a very specific way and it is impossible to disinfect the fish coming in contact with your clients' skin in the required manner. See A.A.C. R 4-10-112(A)(5)(6)(C)(1)(2)(G)(1)(2).
You are jeopardizing you clients' health by performing this type of pedicure.

Only certain products designed for the removal of the epidermis may be used in salons and may be used only in a manner approved by the FDA.
See A.A.C. R 4-10-112 (M)(1)(2)(P)(3)(4). It is obvious that the fish you are using as part of the pedicure are not available for the purpose of removal of the epidermis and for beautification as required by A.A.C. R 4-10-112(P)(3)(4). This rule also prohibits animals and fish (except for regular aquariums) from being present in a salon. A.A.C.R 4-10-112 (T)(2)(3).

Your conduct is in violation of A.R.S. §32-574(A)(10) and could therefore constitute a class 1 misdemeanor pursuant to A.R.S. §32-574(C). This matter will be placed on the next available Board agenda for further action. In the meantime you should immediately refrain from offering or performing fish pedicures in your salon.

Please respond to this letter within 10 days of receipt and detail what actions you will be taking to rectify this situation.

Sincerely,

Sue Sansom

Executive Director
Arizona State Board of Cosmetology

cc Bridget F. Harrington
Assistant Attorney General